IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1935 OF 2005

K.G.Vora Securities Ltd. ..Applicant.

V/s.

Alpesh Mehtad & Anr. ..Respondents.

Ms.Rucheeta Dhuru for applicant.

Mr.Abhijit Kadam & Ajit Agarkar i/b Devi & Asso. for respondent No.1.

Mr.Y.S.Shinde, APP for State.

CORAM: A.M.KHANWILKAR,J

DATE : NOVEMBER 25, 2005.

P.C. :

1. Heard counsel for the parties.

2. Leave to appeal is granted. Admit. Appeal heard forthwith by consent, as short question is raised.

3. Mr.Kadam waives notice for respondent No.1. Learned APP waives notice for respondent No.2 State.

4. The appellant had filed criminal complaint before the Court of Addl. Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai being case No.1081/SS/2004 (old case No.1131/S/2001)

against the respondent no.1 for offence punishable under section 138 r/w 141 of the Negotiable Instruments Act. Suffice it to observe that the said complaint was listed for hearing on different dates and was adjourned as is seen from the roznama. For our purpose it is relevant to note that on July 19, 2004 the appellant as well as his Advocate was absent, for which reason matter was adjourned to August 17, 2004 for evidence. On August 17, 2004 once again the appellant remained absent. The Respondent Accused moved an application for dismissal of the complaint. However, hearing was adjourned to September 7, 2004 at 12 noon. Once again the appellant and his Advocate remained absent on this adjourned date for which reason the court dismissed the complaint and acquitted the Accused under section 256 of the Code. It is the case of the Appellant that on July 19, 2004 the case was transferred to another court and when the appellant realised that position, representative of the appellant rushed to the court where the case was transferred. But by that time matter was adjourned to 17th August, 2004 as the appellant as well as his advocate were absent. It is seen that on 17th August, 2004 the respondent No.1 filed formal application for dismissal of the complaint because of absence of the advocate as well

as complainant. That application was slated to be heard on 7th September, 2004. According to the appellant on 7th September, 2004, the appellant could not attend the court proceedings because of ill-health. Same was the reason for not attending the court on 17th August, 2004. To support the fact that appellant is chronic patient of Bronchitis, medical certificate issued by the concerned Doctor is place record. The averments made in the application nor the medical certificate produced have been countered by the respondent No.1. Therefore, there is no reason to doubt the correctness of the said position. In other words, the appellant has made out sufficient cause for non-appearance on 7th September, 2004 as well as 17th August, 2004. In so far as of non-appearance on 19th July, 2004 is concerned, the appellant could not appear as the case was transferred to some other court and by the time the appellant reached that court, matter was adjourned. Viewed in this perspective, even though the trial Court may be right in observing that the complainant has persistently failed to appear on 19th July, 17th August and 7th September, 2004, to my mind, there being sufficient cause, the conclusion reached by the Magistrate in dismissing the complaint cannot be sustained.

5. In so far as non-appearance of advocate for complainant is concerned, it is well settled that for the mistake of the advocate litigant should not suffer. In the circumstances, this application succeeds.

6. Accordingly, the impugned order recording dismissal of the complaint for non-appearance of the complainant is set aside and the complaint is restored to the file to its original number on condition that appellant shall pay costs to the respondent No.1 quantified at Rs.5,000/- within two week from today.

7. Parties to appear before the Addl. Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai on 23rd December, 2005, so that the trial court can pass appropriate direction for the next date of hearing.

8. Appeal disposed of on the above terms.